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No. 95-448

In the Supreme Court of the United States

OCTOBER TERM, 1995

INTERSTATE BRANDS CORPORATION, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, for the purpose of calculating overtime, the "regular rate" of pay under Section 7(a)(1) of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(a)(1), includes "earned work credits," which are annual payments made to employees for each workweek in which they did not receive two consecutive days off.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 57 F.3d 574. The March 21, 1994 order of the district court (Pet. App. 15a-19a) is reported at 849 F. Supp. 1261, and the district court's September 15, 1993 order (Pet. App. 20a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1995. The petition for a writ of certiorari was filed on September 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA) requires employers to pay employees who work "a workweek longer than forty hours" at least "one and one-half times the regular rate" of such employees' pay for their overtime hours. 29 U.S.C. 207(a).[1] The "regular rate" upon which overtime compensation is calculated includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. 207(e). Several forms of remuneration, however, are excluded from the "regular rate" of pay, including:

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and *other similar payments to an employee which are not made as compensation for his hours of employment.*

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[1] Section 7(a)(1) of the FLSA, 29 U.S.C. 207(a)(1), provides in full:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. 207(e)(2) (emphasis added). Among the other exclusions from the "regular rate" are premium payments for work on "Saturdays, Sundays, holidays, or regular days of rest," or, pursuant to a collective bargaining agreement, "for work outside of the hours established * * * as the basic, normal, or regular workday," but only "where such premium rate is not less than one and one-half times the rate" for like work performed on other days. 29 U.S.C. 207(e)(6) and (7).

2. Petitioner Interstate Brands Corporation is a wholesale baker that, as part of a nationwide collectively bargained system, pays to employees on its payroll at the end of the year "earned work credits" for each workweek in which the employee did not receive two consecutive days off. Pet. App. 2a, 20a-21a. At issue in this case is whether that additional compensation is included in, or excluded from, the employees' "regular rate" of pay for the purpose of calculating overtime compensation under the FLSA.

The system of earned work credits originated in 1972 when the bakery industry settled a nationwide strike with the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO (BCT). Pet. App. 2a; Pet. 3. During the strike, the BCT had demanded that the workers be given weekly schedules with two consecutive days off; the employers, however, insisted that a traditional baker's schedule of Monday, Wednesday, Thursday, Friday and Sunday was necessary to ensure the freshness of their products on Saturdays and Mondays, the biggest shopping days for baked goods. Pet. App. 2a. To end the strike, the parties agreed to a system of "earned work credits," under which an employer who schedules a workweek for an employee that does not include two

consecutive days off must pay $12 per employee for each such week into a fund. *Id.* at 2a, 21a. Those "credits" are then distributed in November of each year to eligible workers according to the number of weeks without two consecutive days off that they worked during the year. *Ibid.*; see Pet. 5. The collective bargaining agreements incorporating this system have provided that the credits are not compensation for work performed, but are instead "penalties" designed to prompt employers, if possible, to provide two consecutive days off. The agreements have also provided that the credits are not part of the wage base upon which overtime is calculated. Pet. App. 2a, 21a.

3. Respondent Secretary of Labor filed this suit in 1991 seeking a prospective injunction requiring petitioner to treat earned work credits as part of its employees' regular rate of pay. In the district court, petitioner contended that the earned work credits are excludable from the regular rate of pay as "other similar payments * * * not made as compensation" under Section 7(e)(2) of the FLSA, 29 U.S.C. 207(e)(2), because they serve as a disincentive "tied to scheduling by the employer, rather than hours worked by an employee." Pet. App. 22a. The Secretary argued that the credits do not come within the terms of the exclusion because they are "regular and recurring remuneration paid to individuals required to work undesirable work schedules." *Ibid.* On cross-motions for summary judgment, the district court found both interpretations plausible. *Id.* at 24a. Because the Secretary had not previously enforced his interpretation during the 20 years that earned work credits had been in use in the baking industry, however, the court required the Secretary to provide a " 'reasoned analysis' for [his] change in approach," rather than

give the Secretary's "permissible" interpretation the "substantial deference" it was otherwise due. *Id.* at 25a.

The Secretary then "put forward a sufficient analysis" of the reasons for interpreting the FLSA as treating petitioner's "regular and recurring" earned work credits as "not the type of payment intended for exclusion from the regular base rate of pay as suggested by the purposes of the statute." Pet. App. 16a, 18a. Because the Secretary's interpretation was reasonable and because the relief sought was purely prospective, the court granted summary judgment in favor of the Secretary. *Id.* at 19a.

4. The court of appeals affirmed. Pet. App. 1a-10a. It reasoned that an earned work credit under the system, "whether or not designed as a 'penalty,' is 'remuneration for employment' and counts [as included within the regular rate of pay] unless it comes within one of § 7(e)'s many exemptions." *Id.* at 4a. Noting that petitioner was relying entirely on the Section 7(e)(2) exemption, the court rejected petitioner's interpretation of the word "similar" in that Section as meaning "any payment 'not made as compensation for * * * hours of employment', which the bakery understands to mean 'not measured by the number of hours spent at work.'" *Id.* at 6a. Rather, viewing Section 7(e)(2) as "one among many exemptions," the court concluded that it could not be read to "exclude every payment that is not measured by the number of hours spent at work." *Id.* at 7a. The court also rejected the Secretary's interpretation of Sec-

tion 7(e)(2), which equated "similarity" with "infrequency" of payments.[2]

The court analogized the $12 credits to year-end bonuses, which, although not dependent on the number of hours worked, must be included in the regular rate unless paid entirely at the discretion of the employer. Pet. App. 7a (discussing FLSA § 7(e)(3), 29 U.S.C. 207(e)(3)). Although recognizing that "the subsections of § 7(e) are not mutually exclusive," the court declined "to read § 7(e)(2) as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the 'regular rate.'" *Ibid.* The court thus rejected petitioner's argument that *Minizza* v. *Stone Container Corp.*, 842 F.2d 1456 (3d Cir.), cert. denied, 488 U.S. 909 (1988), calls for treating "all lump-sum payments negotiated in the collective bargaining process [as] excluded from the 'regular rate.'" Pet. App. 8a. Although the lump-sum payments at issue in *Minizza* were not deemed part of the regular rate, the court determined that *Minizza* is distinguishable from the present case because "the baking industry's accommodation involves long-term, planned distributions of a kind dissimilar to the one-time distribution in *Minizza*." *Ibid.*

Because "the right to receive [the $12 credits] is tied to work schedules that employees dislike," the court also found the credits analogous to premium pay for undesirable shifts or unpleasant work environments. The court noted that such payments are

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[2] Stating that Congress "has not delegated to the Secretary of Labor the power to interpret § 7 of the FLSA," the court said that it was obliged to give the Secretary's interpretations only "the respect their reasoning earns them." Pet. App. 5a.

included in the regular rate under Section 7(e)(6) and (7), unless the premium rate amounts to one and one-half times the normal rate. Pet. App. 8a-9a.

Based on its consideration of the various exceptions in Section 7(e), the court determined that the word "similar" in Section 7(e)(2) "refers to other payments [to an employee] that do not depend at all on when or how much work is performed." Pet. App. 9a. Payments of that sort, the court determined, include "vacation pay, other compensation for hours not worked, * * * reimbursement of expenses," and possibly "call-back pay" (*i.e.*, "compensation for abbreviated rest between work periods"). *Ibid.* Such payments, however, do not include "premium rates for 'bad' shifts," or, in the case of earned work credits, "compensation for working an unpleasant or inconvenient schedule." *Id.* at 9a-10a. The court therefore held that the exceptions in "§ 7(e)(2) [do] not keep the $12 credits out of the 'regular rate.'" *Id.* at 10a.[3]

ARGUMENT

The decision of the court of appeals, which affirms the permanent injunction against petitioner's treating "earned work credits" as exempt from the regular rate of pay for purposes of the Fair Labor Standards

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[3] The court noted, however, that Section 7(e)(7), 29 U.S.C. 207(e)(7) (excluding premium pay greater than 150% of the regular rate), and Section 7(h), 29 U.S.C. 207(h) (providing that certain extra compensation paid under Section 7(e)(7) "shall be creditable toward overtime compensation"), might be applicable "in any follow-on litigation seeking back pay." Pet. App. 10a. Thus, it hypothesized premium pay for Sunday work that, when combined with an allocated portion of the earned work credit, exceeds 150% of the weekday hourly rate and thereby qualifies for exclusion from the regular rate under Section 7(e)(6) or (7).

Act, is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, as petitioner acknowledges (Pet. 11), this case arises out of the "idiosyncratic" practices of the baking industry and involves the treatment of "modest" annual payments for purposes of the overtime provisions of the Act. Further review is therefore unwarranted.

1. a. Petitioner first contends (Pet. 13) that the court of appeals' construction of Section 7(e)(2) contravenes the objectives of the FLSA. In petitioner's view, "none of the concerns toward which Congress directed the FLSA and its overtime provisions exist here" because bakery workers are "highly paid," the credits are the product of "a collectively-bargained inducement to maintain labor peace between a large industry and a strong, national union," and "the work credit system has helped to eliminate unfair competition throughout the baking industry by standardizing contract terms and business practices." Pet. 15 (emphasis omitted). The court of appeals, however, correctly answered that contention by observing that "the overtime provisions of the FLSA apply without regard to the level of the standard wage," and that "[t]here is no collective-bargaining exemption from the FLSA." Pet. App. 8a.

Petitioner seems to argue that because the baking industry does not exploit its workers by paying substandard wages or by requiring excessive overtime, and because the industry has avoided labor trouble by using the collectively bargained earned work credit system, the FLSA should not be strictly enforced in this case.[4] This Court, however, "has consistently

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[4] The argument, supported by amicus BCT (Br. 5-7), that the decision is erroneous because it is "disruptive of labor

construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)). Indeed, because "[b]readth of coverage [is] vital to its mission," *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516 (1950), the FLSA's exceptions are narrowly construed, with the burden placed on the employer to establish that the exception claimed is applicable. See, *e.g.*, *Idaho Sheet Metal Workers, Inc.* v. *Wirtz*, 383 U.S. 190, 209 (1966); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Moreover, it is well established "that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-741 (1981) (citing cases). Thus, "[a]lthough our public policy recognizes the effectiveness of collective bargaining and encourages

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relations" (Pet. 23) is unsubstantiated and has no bearing on the issue at hand. First, it is unconvincing that labor peace in the baking industry depends upon retaining petitioner's treatment of earned worked credits in calculating overtime. What is at stake in this litigation is not the viability of the entire earned work credit system, but rather some adjustments to overtime pay that represent only modest sums of money. See Pet. App. 3a. Second, the fact that the treatment of earned work credits is beginning to arise at the bargaining table does not in any way indicate that the issue cannot be resolved by the parties without resort to "massive strikes and interruption of the stream of commerce." Pet. 23. As the court of appeals noted, "the parties can adjust the collective bargaining agreement" to respond to the treatment of credits as part of the regular rate. Pet. App. 2a-3a.

its use," nothing in that general policy authorizes a court "to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining." *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 463 (1948); see also *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (the regular rate "is not an arbitrary label chosen by the parties; it is an actual fact"); 29 C.F.R. 778.108. Consequently, contrary to petitioner's argument, the decision below is entirely consistent with the FLSA's broad purposes.

b. Petitioner's assertion (Pet. 17-18) that the court of appeals "usurp[ed] the role of Congress" by "amend[ing]" the statutory provision at issue is likewise meritless. The phrase in contention is Section 7(e)(2)'s exclusion from the regular rate of "other similar payments to an employee which are not made as compensation for his hours of employment." 29 U.S.C. 207(e)(2). The "similar payments" refer back to "payments made for occasional periods when no work is performed" (*i.e.*, for "vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause") and "reasonable payments for traveling expenses, or other expenses, incurred by an employee * * * and properly reimbursable by the employer." *Ibid.*; see Pet. App. 9a. Here, the "*earned* work credits" are neither payments for "periods when no work is performed" nor reimbursements for "expenses * * * incurred by an employee."[5]

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[5] The Secretary's regulatory interpretation of Section 7(e)(2) explains that payments under the "other similar payments" exclusion must "be 'similar' in character to the pay-

The earned work credits are compensation for being required to work an undesirable schedule, namely one in which the employee is not given two consecutive days off in a workweek. Such extra payments "tied to work schedules that employees dislike" are, as the court of appeals determined, most similar to "premium wages for working weekends, or the night shift, or in noisy plants." Pet. App. 8a.[6] As

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ments specifically described in section 7(e)(2)." 29 C.F.R. 778.224(a). As examples, it lists:

> (1) Sums paid to an employee for the rental of his truck or car.
>
> (2) Loans or advances made by the employer to the employee.
>
> (3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.

29 C.F.R. 778.224(b). Obviously, the earned work credits in this case are not at all similar in character to these exemplary payments.

[6] Petitioner takes issue with this characterization on the ground that, unlike a "Sunday rate" or a "nighttime rate," the earned work credit "is *indifferent* to what hours of the day or days of the week the work is done." Pet. 24. However, the extra payment for working a week without having two consecutive days off is comparable to the other forms of premiums, which likewise compensate for intrusions on the employee's leisure time. Moreover, petitioner is mistaken in asserting that the characterization of the earned work credit system as "an incentive to employers" (*ibid.*), or "a penalty on the employer for * * * lowering the quality of their employees' time off" (Pet. 25), somehow precludes the payments from being incorporated in the regular rate. Other forms of premium pay, such as for working nights or Sundays, may also function as an "incentive" for employers to minimize such work and a "penalty"

the court of appeals pointed out, premium wages of this sort may be excluded from the regular rate upon which overtime is calculated only if specified statutory conditions are met. Such wages are excludable if, for instance, they are paid entirely at the discretion of the employer, 29 U.S.C. 207(e)(3), or if they are one and one-half times the rate that is normally paid, 29 U.S.C. 207(e)(6) and (7).[7] Otherwise, they are included in the regular rate. See 29 C.F.R. 778.207(a) ("extra compensation provided by premium rates other than those described cannot be treated as overtime premiums"), (b) ("The Act requires the inclusion in the regular rate of such extra premiums as night-shift differentials * * * and premiums paid for hazardous, arduous or dirty work.").

The court of appeals was correct not to read Section 7(e)(2) "in isolation," and to reject a reading, offered by petitioner, that would exclude "every pay-

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for employers when they do not, yet those attributes do not altogether remove such payments from the regular rate. Accordingly, the court of appeals was correct in holding that "[t]he $12 credit, whether or not designed as a 'penalty,' is 'remuneration for employment' and counts unless it comes within one of § 7(e)'s many exemptions." Pet. App. 4a.

[7] Petitioner mischaracterizes Section 7(e)(6) and (7), stating (Pet. 25) that those exceptions were designed solely "to prevent requiring 'overtime to be paid on overtime.'" The exceptions for premium payments (*e.g.*, for Sunday work or irregular off-hours work) that are at least one and one-half times the normal rate apply whether or not the premiums are paid to employees who have already worked at least 40 hours in the week. In other words, the extra payments are for working on Sunday or outside normal working hours, not for working overtime. Compare 29 U.S.C. 207(e)(5); 29 C.F.R. 778.202 (premium pay for hours in excess of daily or weekly standard).

ment that is not measured by the number of hours" worked. Pet. App. 7a (declining to read Section 7(e)(2) "as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the 'regular rate' "). The court's holding (*id.* at 9a) that "[t]he word 'similar' [in Section 7(e)(2)] refers to other payments that do not depend at all on when or how much work is performed" is consistent with the Act's scheme of exceptions and does not, as petitioner asserts (Pet. 18), "rewrit[e] the FLSA."

2. The court of appeals' decision does not conflict with the Third Circuit's decision in *Minizza* v. *Stone Container Corp.*, 842 F.2d 1456, cert. denied, 488 U.S. 909 (1988). In *Minizza*, the Third Circuit held that two lump-sum payments made to induce employees to ratify a collective bargaining agreement were exempted from the definition of "regular rate" under Section 7(e)(2). The court determined that those lump-sum payments "share[d] the essential characteristic with the other types of compensation specifically included in [Section 7(e)(2)] of not being compensation for hours worked *or services rendered.*" 842 F.2d at 1462 (emphasis added). *Minizza*'s holding is thus substantially similar to that of the Seventh Circuit in this case, which stated that payments not tied to "when or how much work is performed" are excluded from the regular rate. Pet. App. 9a. Under either court's formulation, earned work credits must be included in the regular rate because they are paid for "services rendered" or "work performed" during weeks in which an employee did not receive two consecutive days off. See 29 C.F.R. 778.224(a) (the "other similar payments" language in Section 7(e)(2) "was not intended to permit

the exclusion * * * of payments such as bonuses * * * which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services"). The lump-sum payments that were excluded in *Minizza* are distinguishable because they were not tied to work performed or services rendered: their purpose was to encourage employees to ratify a collective bargaining agreement; each employee received the same amount of money regardless of how much work he or she had done; and the payments were one-time distributions. 842 F.2d at 1458.

Contrary to petitioner's contention (Pet. 21), the court below did not "overlook[] the fact that the earned work credit system was * * * an inducement to contract ratification" or that the payments were intended to operate as penalties for employers who impose unfavorable work schedules. Rather, the court determined that, irrespective of how the parties describe the earned work credits or their motives for incorporating them in collective bargaining agreements, the credits function as "remuneration for employment" that is not subject to any of the enumerated exceptions. Pet. App. 4a; see also *id.* at 8a ("That there was a strike in 1972 cannot detract from the fact that the baking industry's accommodation involves long-term, planned distributions of a kind dissimilar to the one-time distribution in *Minizza.*"). Thus, the court below, like the Third Circuit in *Minizza*, properly focused on the substantive character of the payments and the manner in which they were made in order to determine whether the payments were tied to work performed or services rendered. See *Minizza*, 842 F.2d at 1462 n.9 ("What is important is the substantive characterization of the

payments," as opposed to "what the payments are termed."). The conclusion by the court below that earned work credits are, in fact, payments for working an undesirable schedule is thus consistent with the holding of *Minizza*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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